No. 03-740

In the Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL., PETITIONERS

v.

SENECA-CAYUGA TRIBE OF OKLAHOMA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Respondents do not, and cannot, dispute that a square conflict exists between the Tenth Circuit in this case and the Eighth Circuit in *United States* v. *Santee Sioux Tribe*, 324 F.3d 607 (2003), petition for cert. pending, No. 03-762, on the principal question presented in the petition: whether the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. 2701 *et seq.*, provides an implied exemption from the Johnson Act, 15 U.S.C. 1171 *et seq.*, for certain gambling devices used at tribal casinos in the absence of a tribal-state compact. Although respondents claim that the case has been mooted by their own voluntary conduct, the court of appeals correctly rejected that claim. Indeed, in view of respondents' admission that they have continued to manufacture and use substantially similar machines, there can be no question that a live controversy exists over whether they are subject to prosecution under the Johnson Act for the transportation, sale, or possession of such machines in Indian country.

Although respondents also claim that the Tenth Circuit was correct in holding that the Johnson Act has no application to gambling devices used by Tribes as supposed "electronic, computer, or other technologic aids" to Class II

games under IGRA, that would be no reason, even if true, to withhold review. In any event, respondents' defense of the Tenth Circuit's holding is unavailing, as is their attempt to diminish the significance of this case for the regulation of gaming in Indian country. As confirmed by the nine amici States that have urged the Court to grant the government's certiorari petition, this case "dramatically and erroneously undermines the important balance between Tribal and State interests in the compromise legislation that is IGRA." Br. of Amici Br. of States of California, et al. (States Br.), at 6.

A. THERE IS NO MERIT TO RESPONDENTS' SUGGESTION THAT THIS CASE HAS BEEN MOOTED BY THEIR OWN VOLUNTARY CONDUCT

Respondents contend that this case has become moot solely because respondent Diamond Game Enterprises has voluntarily ceased to manufacture Magical Irish and the other respondents have voluntarily ceased to use Magical Irish at their casinos. Br. in Opp. 15-18. The court of appeals correctly rejected that contention. Pet. App. 14a-17a. This case continues to present a live controversy about whether the Johnson Act prohibits the use of Magical Irish and similar devices at tribal casinos in the absence of a tribal-state gaming compact. The fact that respondents have shifted from one materially indistinguishable device to another does not render the case moot.

This Court has articulated the analysis to be applied in determining whether or not "a request for declaratory relief is moot": "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, *of sufficient immediacy and reality to warrant the issuance of a declaratory judgment*." *Preiser* v. *Newkirk*, 422 U.S. 395, 402 (1975) (quoting *Maryland Cas. Co.* v. *Pacific Co.*, 412 U.S. 270, 273 (1941)). The inquiry is thus comparable to that for assessing whether a justiciable controversy exists in cases seeking

other sorts of relief. As the Court has noted, "[i]t is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case." *Maryland Cas.*, 312 U.S. at 273. The mere fact that respondents are declaratory judgment plaintiffs does not, therefore, suggest that any special weight should be accorded their assertions that they do not intend to resume manufacturing or using Magical Irish. There are, in fact, several independent reasons why the issues presented in the petition retain "sufficient immediacy and reality" to warrant resolution.

First, respondents have continued, in practical effect, to manufacture and use Magical Irish, albeit under a different name and a slightly different design. As respondents acknowledged below, respondent Diamond Game Enterprises still manufactures Lucky Tab II, and the respondent Tribes use Lucky Tab II at their casinos. See Pet. App. 13a. Lucky Tab II, the device in *Santee Sioux*, is indistinguishable from Magical Irish for purposes of the legal issues in this case.

Respondents have not disputed the substantial similarity of Magical Irish and Lucky Tab II for such purposes. Indeed, respondents brought this case in response to an advisory ruling of the National Indian Gaming Commission (NIGC), which relied on a (since vacated) district court opinion classifying Lucky Tab II as a Class III device under IGRA and which expressly recognized that "Lucky Tab II closely parallels Magical Irish." Letter of Kevin K. Washburn, General Counsel, NIGC, to Stephan A. Lemske 3 (Feb. 29, 2000); see *id.* at 6 ("[T]he system features [of Magical Irish] are almost entirely those of Lucky Tab II."); Pet. App. 9a-10a; compare Pet. App. 8a-9a (describing Magical Irish), with *Santee Sioux*, 324 F.3d at 610 (describing Lucky Tab

II), and *Diamond Game Enters.* v. *Reno*, 230 F.3d 365, 367-368 (D.C. Cir. 2000) (same).[1]

Second, respondents profess to have brought this action because they feared prosecution under, *inter alia*, the Johnson Act for the sale, use, or possession of Magical Irish. See Br. in Opp. 17-18. The possibility of such prosecution continues to exist. As the court of appeals recognized, because respondents did not cease their Magical Irish activities until November 2000 (and, in some cases, December 2001), the statute of limitations for a Johnson Act prosecution would not run until at least November 2005. Pet. App. 15a.

Third, respondents' choice to cease manufacturing and using Magical Irish was purely voluntary. They retain the discretion to resume those activities at any time. As this Court has explained, "[v]oluntary cessation of challenged conduct moots a case * * * only if it is *absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 222 (2000) (per curiam) (internal quotation marks omitted). It is not at all clear that the behavior on which respondents sought a declaratory ruling will not recur—even aside from the fact that essentially the same behavior has continued with respect to Lucky Tab II.

B. RESPONDENTS' ANALYSIS OF THE RELATIONSHIP BETWEEN THE JOHNSON ACT AND IGRA IS CONTRARY TO IGRA'S TEXT AND HISTORY

Contrary to respondents' assertions, neither the text nor the legislative history of IGRA suggests that Congress, by authorizing Tribes to use "technologic aids" to conduct bingo and (arguably) other Class II games, intended to allow

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[1] Although respondents identify two design differences between Lucky Tab II and Magical Irish (see Br. in Opp. 9 n.2), neither is material to the questions here. If anything, the distinctive features of Lucky Tab II, such as the combination of component parts into a single unit, enhance the resemblance to a slot machine or other gambling device.

Tribes to use Johnson Act gambling devices. See Br. in Opp. 19-23. As previously explained (Pet. 10-17), the text of IGRA makes clear that the Johnson Act remains fully applicable to all gambling devices on Indian lands with one exception (*i.e.*, when a Tribe has entered into a Class III gaming compact with a State, see 25 U.S.C. 2710(d)(6)). That reading is confirmed by the Senate Report and other legislative history.

IGRA states that a Tribe may engage in Class II gaming only if "such gaming is not otherwise specifically prohibited on Indian lands by Federal law." 25 U.S.C. 2710(b)(1)(A). Respondents are incorrect that the Johnson Act is too "general" to be such a law. Br. in Opp. 22. The Johnson Act explicitly makes it unlawful to "possess[] or use any gambling device * * * within Indian country." 15 U.S.C. 1175(a). More specifically prohibitory language would be difficult to imagine, and respondents do not identify any supposedly more "specific" statute to which Section 2710(b)(1)(A) might have been intended to refer. Indeed, the Senate Report makes clear that the Johnson Act is precisely the "Federal law" referred to in Section 2710(b)(1)(A). S. Rep. No. 446, 100th Cong., 2d Sess. 12 (1988) ("The phrase 'not otherwise prohibited by Federal Law' refers to gaming that utilizes mechanical devices as defined in 15 U.S.C. 1175.").

Respondents, like the court of appeals, misread the Senate Report—which could not, in any event, contradict the unambiguous statutory text. The Report, as noted, explicitly states that Section 2710(b)(1)(A), in preserving other federal laws that prohibit gaming in Indian country, refers to the Johnson Act. Moreover, the sentence in the Report on which respondents rely (Br. in Opp. 5) expresses an intent to permit Tribes to use *only* "otherwise legal devices" in Class II gaming (S. Rep. No. 446, *supra*, at 12)—a phrase that excludes "gambling devices" that are illegal under the Johnson

Act, which the text of Section 2710(b)(1)(A), confirmed by the Report, continues to make applicable to Indian country.

Although respondents seize on the Report's statement that the Johnson Act "prohibits gambling devices on Indian lands but does not apply to devices used in connection with bingo and lotto," *ibid.*, that statement is of no help to respondents. It does not evince any congressional intent to permit Tribes to use, as "aids" to Class II gaming, gambling devices, such as Magical Irish, that are prohibited by the Johnson Act. At most, the statement expresses the view of a later Congress on whether certain unidentified devices used in connection with bingo or lotto are prohibited by the Johnson Act as enacted years earlier. Whatever the soundness of the Report's view that the Johnson Act does not apply to those devices (see Pet. 12 n.2 (discussing IGRA's narrow authorization for bingo numbers to be either "drawn" or "electronically determined," 25 U.S.C. 2703(7)(A)(II))), the Report does not make any reference to "pull tabs" or suggest the sort of wholesale *exemption* from the Johnson Act that respondents urge for any device that could be characterized as an "aid" to playing a Class II game like *paper* pull tabs. If there could be any lingering doubt, however, it is dispelled by the statement of Senator Inouye, IGRA's sponsor, immediately before its Senate passage. He stated that IGRA "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State." 134 Cong. Rec. 24,024 (1988).

Respondents' reliance on the Report's references to affording Tribes "maximum flexibility" to use "modern methods of conducting class II games" is also misplaced. Br. in Opp. 22. As the rest of the paragraph that respondents quote makes clear, that statement refers to the use of "telephone, cable, television or satellite" equipment to enable Tribes "to coordinate their class II operations" by, "[f]or

example, linking participant players at various reservations." S. Rep. No. 446, *supra*, at 9. Such equipment, which does not come within the Johnson Act's "gambling device" definition (*e.g.*, because it is not "designed and manufactured primarily for use in connection with gambling," 15 U.S.C. 1171(a)(2)), is entirely unlike Magical Irish and similar devices, which are designed to resemble slot machines.

Because IGRA's text makes clear that Johnson Act gambling devices *cannot* be used in Class II gaming, there is no warrant to resort to the canons of construction urged by respondents. Nor would the application of those canons assist respondents. For example, respondents' countertextual construction of Section 2710(b)(1)(A) is not necessary, as they assert, "to give effect" to IGRA, and specifically to its allowance of "aids" to Class II games. Br. in Opp. 19-20. As noted above, Section 2710(b)(1)(A) leaves a wide array of "aids" available to Tribes, including the "telephone, cable, television or satellite" equipment specifically referred to in the Report. Nor are respondents assisted by the canon that a "specific statute governs over a more general one," *id.* at 20, because the Johnson Act is no less specific than IGRA and, in any event, IGRA *itself* addresses the continued applicability of the Johnson Act to gaming in Indian country. See 25 U.S.C. 2710(b)(1)(A) and (d)(6).

C. RESPONDENTS ERR IN ASSERTING THAT THE QUESTION WHETHER THE JOHNSON ACT APPLIES TO GAMBLING DEVICES USED IN CLASS II GAMING DOES NOT WARRANT REVIEW

As explained in the petition (at 18-20), the Tenth Circuit's decision in this case conflicts with the Eighth Circuit's decision in *Santee Sioux* and undermines the regulatory scheme that Congress created in IGRA. Each reason is sufficient in itself to warrant the Court's review.

Contrary to respondents' suggestion, the disagreement between the Eighth and the Tenth Circuits cannot be dis-

missed as "academic" merely because the Eighth Circuit ultimately ruled against the government on other grounds. Br. in Opp. 18. The Eighth Circuit squarely held that a machine cannot be used in tribal gaming absent a tribal-state compact unless the machine *both* is not a "gambling device" as defined in the Johnson Act *and* is a "technologic aid" to Class II gaming as defined in IGRA. See 324 F.3d at 611-612. Although the Eighth Circuit held that the Lucky Tab II machine satisfied both requirements, the court understood that *other* machines, even if they are "technologic aids" under IGRA, still would be prohibited as "gambling devices" under the Johnson Act. In the Tenth Circuit (as well as the Ninth Circuit), in contrast, the sole inquiry is whether the machine is a "technologic aid" under IGRA.

IGRA contemplates an important role for the States in the regulation of casino-style tribal gaming—in particular, gaming that involves the use of slot machines and other Johnson Act devices. See Pet. 15-17. Congress understood that only the States had significant experience in regulating such gaming, which posed a particular threat of exploitation by organized crime and other criminal elements. Congress accordingly provided that Johnson Act gambling devices could be used in tribal gaming if, but only if, a Tribe had entered into a compact with "a State in which gambling devices are legal." 25 U.S.C. 2710(d)(6)(A). It was thus the Johnson Act itself that was to demarcate, to a significant extent, the relative spheres of regulatory authority of States (for Class III gaming) and the NIGC (for Class II gaming). Congress did not intend that the general and potentially expansive term "electronic, computer, or other technologic aid" elsewhere in IGRA would determine which tribal gambling was subject to state regulation and which was subject to NIGC regulation. Yet, that is the consequence of the court of appeals' decision. Respondents are thus incorrect that the Tenth Circuit's decision "in no way opens the door for class III gaming in the

absence of a compact." Br. in Opp. 24. The decision precludes state regulation, through the compacting process, of gaming that Congress placed in Class III.[2]

The importance of the Tenth Circuit's decision to tribal gambling regulation is confirmed by the nine States with Class II tribal gaming that have filed a brief as amici urging the Court's review in this case. As those States explain, the Tenth Circuit's decision and similar decisions have the potential to prevent States from exercising regulatory oversight of Johnson Act gambling devices "to ensure against fraud, corruption, and infilration by Organized Crime," as well as from securing compensation for the social, environmental, and public safety costs that States incur as a result of such gaming. States Br. 1-2, 3-5. Those States also explain that resolution of the conflict between the Eighth and Tenth Circuits on the question presented here is

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[2] Respondents' assertion of "opposing view[s]" within the United States government on the questions presented by this case is potentially misleading. Br. in Opp. 24. The positions expressed in the certiorari petition are, of course, the positions of the United States. As stated in the petition, although a divided NIGC recently took the view that the Johnson Act does not apply to Class II aids, that view "is contrary to the text and history of IGRA and does not represent the position of the United States." Pet. 22 n.7. Respondents also rely on a 1996 memorandum of the Department of Justice's Office of Legal Counsel, which stated that "Congress did not intend for section 1175 [the Johnson Act] to bar the use of [certain] technologic aids on Indian lands when operated in compliance with the class II provisions of IGRA," even when such aids are "gambling devices" under the Johnson Act. Memorandum to Seth P. Waxman, Associate Deputy Attorney General, from Richard Shiffrin, Deputy Assistant Attorney General (June 13, 1996). As the government explained below, that memorandum has been repudiated and does not represent the United States' interpretation of the Johnson Act or IGRA. Gov't C.A. Br. 25-26 n.2. To the extent that respondents might be understood to imply that the NIGC or the Office of Legal Counsel has taken the position that Magical Irish and Lucky Tab II do not satisfy the Johnson Act's "gambling device" definition, any such understanding would be incorrect. And, in any event, the Department of Justice, not the NIGC, has the authority to interpret and enforce the Johnson Act.

important to prevent "confusion and discord between Tribes and States." *Id.* at 11.

D. THE QUESTION WHETHER MACHINES SUCH AS MAGICAL IRISH AND LUCKY TAB II SATISFY THE JOHNSON ACT'S "GAMBLING DEVICE" DEFINITION ALSO WARRANTS THE COURT'S REVIEW

For reasons more fully explained in the government's certiorari petition and reply brief in *Santee Sioux*, this Court's review is also warranted on the question whether the Johnson Act's "gambling device" definition, 15 U.S.C. 1171(a)(2), applies to machines such as Magical Irish and Lucky Tab II. While the Tenth Circuit did not reach that question, this Court would have the authority to do so. See *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984) ("Although we do not ordinarily consider questions not specifically passed upon by the lower court, this rule is not inflexible, particularly in cases coming, as this one does, from the federal courts.") (internal citation omitted). Here, the parties addressed whether Magical Irish is a "gambling device" under Section 1171(a)(2) at all stages of the proceedings, and the district court decided that question. See Pet. App. 46a. And, if the certiorari petition is granted in *Santee Sioux*, essentially the same question will already be before the Court.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted and the case should be consolidated for argument with *United States* v. *Santee Sioux Tribe*, No. 03-762.

Respectfully submitted.

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